IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 425 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AKIL ABBASBHAI KAPADIYA - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR BB NAIK for Applicant(s) : 1,
MR.BHATE, ADDL.PUBLIC PROSECUTOR for Respondent(s) : 1,
NOTICE NOT RECD BACK for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : /10/2007

CAV JUDGMENT

The petitioner is original accused of Criminal Case No.765 of 1993, decided by the learned Chief Judicial Magistrate First Class, Kalol, Dist:

Panchmahals holding him guilty for committing offence punishable under the Prevention of Food Adulteration Act (hereinafter referred to as the “P.F.A. Act”). The said order of conviction and sentence passed by the learned J.M.F.C., Kalol was assailed by the petitioner by way of preferring Criminal Appeal No.43 of 1999 before the learned Sessions Court, Panchmahal at Godhra and the learned Additional Sessions Judge, Panchmahal at Godhra on 31st July, 1999 was pleased to dismiss the appeal of the petitioner and confirmed the finding recorded by the learned J.M.F.C.

2.1 The petitioner thereafter preferred the present Revision Application under the provisions of Section 397 read with Section 401 of the Code of Criminal Procedure and has challenged the judgments of both the lower Courts on various grounds as mentioned in paragraph 4 of the memo of Revision Application.

2.2 Mr.B.B.Naik, learned Advocate appearing for the petitioner has taken this Court through the various grounds of challenge as well as the evidence evaluated by both the lower Courts while developing his arguments.

3. To appreciate the rival contentions, it is necessary to state the case of prosecution in brief. It is alleged that petitioner is having a shop in the name of Fakhari General Stores situated at and post Aeral, Tal. Kalol, Dist: Panchmahal. On 4th March, 1993 the respondent No.2-Food Inspector visited the shop of the petitioner and took the sample of black pepper and sent the said sample to the Public Analyst, Vadodara for analysis and as per the report of the Public Analyst, the said sample was found to be adulterated. So, after completing the formality as required under the law, the respondent No.2 filed a formal complaint against the petitioner for the offence punishable under Section 2 (1-A), (A) (M), 2 (9) (D) and under Section 7 (1) (2) (5) punishable under Section 16 (1) of the Prevention of Food Adulteration Act, 1954 in the Court of learned Judicial Magistrate First Class, Kalol wherein at the conclusion of the trial, the learned J.M.F.C., was pleased to convict the petitioner-accused to undergo rigorous imprisonment for six months and to pay a fine of Rs.1,000/- and in default of making payment of fine to undergo simple imprisonment for one month. The said order of conviction and sentence has been

challenged by the petitioner before the Court of Sessions by way of preferring an appeal and the learned Judge after considering the facts and evidence of the case so also, after hearing the parties, was pleased to dismiss the said appeal. Hence, the petitioner-accused is before this Court.

4. There is no dispute as to the ownership of the shop from where the sample was drawn or as to the fact that the sample was taken from the shop of the petitioner. Both the Courts below have held that the respondent No.2-Food Inspector was authorized to draw the sample from the shop of the petitioner being notified Food Inspector. There is no dispute as to the qualification of the Food Inspector and his competency and knowledge about the drawing of sample of food article. There are more than one finding of facts that the sample of the black pepper worth 600 gms., was taken out of total stock of 5 Kg., which was available at the shop of the petitioner. As contemplated under the relevant rule, the sample was sealed and the petitioner had signed on the label affixed on the bottle as provided under Rule 15 of the P.F.A. Act.

5. During the course of hearing Mr.Naik, learned Advocate for the petitioner-accused has not seriously assailed the evidence appreciated by both the Courts as regards the procedure adopted for drawing of sample, sealing and forwarding it to the public analyst. It is in evidence of the complainant-Food Inspector that the bottles in which the sample was kept and sealed were cleaned by him personally and even no such help of peon was taken for the said purpose. Both the Courts below have held that there is sufficient evidence on record to show that the bottles were dry, cleaned and without smell and moisture. Both the Courts below have rightly held that Rule 14 of the P.F.A. Rules, 1955 cannot be said to have been violated because the learned trial Court has referred one decision reported in case of **State of Gujarat Vs. Sohanlal Trilokchand Shah, reported in 1995 G.L.R. 1099.** But on facts, the observation made by this Court was not found helpful to the present petitioner, as in the present case the complainant-Food Inspector himself had taken the sample in the bottles which were cleaned by him personally. In the same way, there is sufficient evidence to show that Rule 15 and 16 has been complied with by the

complainant. As such the evidence of the complainant as to the test of cross-examination proved satisfactorily that the sample was divided in three equal parts and were sealed in three airtight bottles and labels were also affixed on all the three bottles with required details and requirements of provisions of Rule 14, 15 and 16 were taken care of. As such there is no dispute as to the purchase of this sample and forwarding the same for analysis. The version of the Food Inspector vis-a-vis the report of the Public Analyst (Exh.17) indicate same thing, then it is clearly established that the sample was sent in the nature of parcel. It was received by the Office of Public Analyst in a sealed condition. The sample is required to be sealed and it is necessary to seal the box in which the bottles are sent or kept. The seal was found intact and therefore both the Courts below have rightly held that Rule 17 and 18 were also complied with satisfactorily.

6. In response of the query raised by this Court, Mr.Naik has mainly concentrated his arguments that there is no satisfactory legal evidence to show that Section 13 (2) of the P.F.A. Act was strictly complied with and in such a situation the accused can

be granted benefit. He has submitted that the finding recorded by both the Courts below in this regard is erroneous and as such there is no evidence which can be said to be the best evidence and the accused ought to have been acquitted giving him benefit on the ground that Section 13 (2) has not been complied with by prosecution. The Food Inspector has stated in his deposition that on receipt of the report from the Public Analyst, a complaint came to be filed and the accused-vendor was informed about the finding recorded by the Public Analyst by Local Health Authority by sending the same through Registered Post A.D. The complainant was also informed about the steps taken by the Local Health Authority and he had tendered that document vide Exh.22.

7. According to Mr.Bhate, learned A.P.P., appearing for the State, genuineness of the address of the vendor was not seriously disputed and document Exh.22 is sufficient to show that accused-vendor was informed about the finding arrived at by the Public Analyst. The R.P.A.D. slip received back from the Postal Department are produced at Exh.44. It is submitted by Mr.Naik that mere production of Office

Copy of the letter received by the complainant would not prove that report of the Public Analyst was sent to accuse-vendor alongwith the similar letter, unless any responsible person from the Office of the Local Health Authority is examined. There must be some direct evidence which would show that notice under Section 13 (2) alongwith the copy of the report of the public analyst was sent alongwith proof satisfactory in nature as to the dispatch of such notice. The R.P.A.D. slip would only prove that one envelop sent by the Local Health Authority was received by the accused-vendor and that by itself would not sufficient to infer that the envelop received by the accused-vendor was containing the Notice issued under Section 13 (2) alongwith the report of the Public Analyst. So, the evidence in this regard is lacking and the benefit therefore deserves to be given to the accused.

8. According to me, the learned trial Judge has rightly discussed and recorded the finding that the report of the Public Analyst (Exh.17) has been received in evidence and there is no inherent infirmity in the background and therefore it was possible for this Court to consider the document

produced at Exh.17. It is held that sample of the black pepper taken from the shop of the petitioner and sent for analysis, which shows the presence of mineral oil. True it is that exact percentage has not been mentioned but the presence of mineral oil with black pepper makes the food article adulterated within the meaning of provisions of Food Adulteration Act, as prescribed for black pepper under the P.F.A. Act.

9. Mr.Naik has attempted to show that as the accused-vendor was not made aware about the exact finding arrived at by the Public Analyst, the petitioner-accused could not opt to send the sample to Central Food Laboratory and this would result into serious prejudice to his defence. But, on evaluation of evidence, it is clear that the facts stated by the complainant that the Local Health Authority had sent Notice under Section 13 (2) of the Act to the petitioner-accused, was not seriously challenged. During the cross-examination it is also not challenged that complainant-Food Inspector had also sent a copy of such Notice to the accused-vendor through Local Health Authority. The contents of Office copy received voluntarily in evidence has to

be read as a whole which corroborates the version of the complainant. It is rightly pointed out from the judgment of learned trial Judge that the Registered Post A.D. slip was tendered with one forwarding letter and same has been received in evidence on admission made by the accused. The learned trial Judge has observed that documents produced at Exh.44 was tendered with the list of evidence produced at Exh.43 and the endorsement clearly shows that the advocate appearing for the petitioner has raised no objection in exhibiting the said document. So document produced at Exh.44 has been received in evidence on consent, meaning thereby, the accused was not interested in getting any formal proof as to the dispatch of the document sent to him through Registered Post A.D. Therefore, no formal evidence was required to be led by prosecution.

10. It would not be either legal or proper to observe that non-examination of any responsible person from the Local Health Authority would adversely affect to the version of the complainant that the accused-vendor was served with the Notice as required under Section 13 (2) of the Act. The original notice always remained with the accused. On

the contrary the evidence according to me is sufficient to show that accused-vendor was served with the Notice under Section 13 (2) of the Act when the Registered Post A.D. slip has been received in evidence on the consent given by the Advocate defending the accused.

11. It would be a matter of stretching the imagination beyond reasons. The envelope or post received by the petitioner-vendor by Registered Post A.D. may have contained the blank papers or any other document totally foreign to the present prosecution, but according to me the totality was required to be appreciated which was available on record and same was rightly appreciated by both the Courts below. When the complainant has stated that accused-vendor was served with the Notice under Section 13 (2) of the P.F.A. Act by the Local Health Authority and to prove that statement, he tendered the Registered Post A.D. Slip (Exh.44) alongwith copy of such Notice received by the accused with necessary details, it would be highly improper for this Court to say that the finding recorded by both the Courts below is extraneous and patently based on extraneous consideration.

12. The decision cited by Mr.Naik, in case of ***Rameshwar Dayal Vs. State of U.P., reported in 1996 SCC (Cri) 75***, would not help the accused. The Apex Court on careful appreciation of the document found that the report of the public analyst was not supplied to the accused as required under Section 13 (2) of the Act. The nature of evidence available with the Apex Court is not reflected in the cited decision. The High Court rejected the point taken by the accused on the ground that the accused cannot raise such plea for the first time in the High Court as it was not taken before the trial Court. There is no dispute as to dis-proposition of law. Any legal aspect can be pointed out by the party, if is found valid enough to affect the finding recorded, because the Courts below are supposed to do substantive justice. In the present case this plea was taken before the trial Court and before the appellate Court and after evaluating the oral evidence of the Food Inspector, vis-a-vis the document tendered, both the Courts have concurrently held that there is no violation of either Section 13 (2) of the Act.

13. The second decision cited by Mr.Naik, in case of **State of M.P. vs. Guman Singh decided while dealing with Criminal Appeal No.979 of 1978 on 4th December, 1982**, whereby the Madhya Pradesh High Court decided to acquit the accused as the Court was satisfied that the copy of the report of the Public Analyst is not proved to have been delivered to the accused-vendor at any time after the institution of the prosecution so as to enable him to get the sample further analyzed by the Central Food Laboratory, Calcutta. In case before the Madhya Pradesh High Court, only bald statement of the Food Inspector was available to the Court whereby he has stated that accused was served with the Notice under Section 13 (2) of the Act. Here, the facts stated by the complainant-Food Inspector gets ample corroboration from production of Office copy received by him which clearly indicates that the original notice was addressed to the accused-vendor by Local Health Authority and as discussed earlier, the Registered Post A.D. slip has been received in evidence on admission made by the accused. It is also relevant to note that mere bald statement also can be read and considered by the Court, if the same is not found

challenged during the course of cross-examination. It is not clear from the decision cited, but this Court has reason to believe that bald statement made by the complainant-Food Inspector in case before the Madhya Pradesh High Court must have been challenged and therefore some more evidence was required to be led.

14. The Court is also not convinced that best available evidence has not been led by prosecution in the present case in respect of service of notice with the copy of report of Public Analyst to the accused-vendor as required under Section 13 (2) of the Act. By placing reliance on the observations made by the Apex Court, in case of Rama ***Paswan & Ors. Vs. State of Jharkhand, reported in 2007 A.I.R. SCW 2779***, Mr.Naik has submitted that if the prosecution fails in producing the best available evidence then the adverse inference against the prosecution can be drawn. Of course, the facts of the cited decision are materially different but the ratio propounded by the Apex Court in paragraph 9 of the judgment would squarely help the accused. The Supreme Court has observed in paragraph 9 as under:

"9..... It is a cardinal rule in the law

of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short 'the Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But on weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence."

14.1 In this cited decision the Apex Court has considered the principle propounded earlier by the Apex Court in case of ***Jamatraj Kewalji Govanni v. State of Maharashtra (AIR 1968 SC 178).***

15. What best evidence in the present case could have been led by prosecution when the complainant himself has stated that accused was served with Notice under Section 13 (2) of the Act. He had also received the Office copy of the Notice and the proof of receipt of one envelope from the Local Health Authority stating that the A.D. slip is of the

envelope serving Notice under Section 13 (2) of the Act to the petitioner-accused and same has been received in evidence on admission made by the defence counsel. It would be too much to expect that the person who had prepared the envelope to step into the witness box with the Office copy retained by the Local Health Authority and also as to proof of dispatching it, so also, the evidence of peon who has been instructed to put all the papers in a sealed envelope. When Office copy is already available on record and the complainant has stated something in this regard and the Registered Post A.D. slip has been received in evidence in the background of contents of the document Exh.44 Colly., the lower Courts were legally entitled to observe and also to record the finding that requirement under Section 13 (2) has been satisfactorily complied with. It is not the say of the petitioner-accused in the statement recorded under Section 313 of the Cr.P.C. that he had received Notice only or altogether a different document than alleged by the prosecution and the envelope was not containing a copy of Notice issued under Section 13 (2) of the Act. The Court is of the view that such explanation even if is tendered, needs to be considered in the background of the totality

emerging from the record. Each word uttered by the accused in the statement under Section 313 of the Cr.P.C. should not be read and considered as a gospel truth. So, in the present case, there was no scope for the lower Courts to draw any inference against the accused nor this Court is inclined to draw that inference. On the contrary, according to this Court this is a case where both the lower Courts have rightly drawn the inference against the petitioner-accused-vendor that Section 13 (2) has been complied with in the present case.

16. As such the prosecution was under obligation to lead evidence to the satisfaction of the Court and as such there was no statutory obligation. A mode selected to prove the fact of serving Notice under Section 13 (2) of the Act, to the accused-vendor is found satisfactory in nature then it would neither be legal or proper for this Court to say that the prosecution had withheld any document or evidence with ulterior motive which was required to be produced by him or inaction in discharging the statutory function.

17. The other decision of the Bombay High Court

in case of **Suryakant Khanderao Sangle Vs. Karbhari Anna Satpute and another decided in Criminal Appeal No.522 of 1989 decided on 25th December, 1990** relied on by Mr.Naik is in reference to Rule 14 of the P.F.A. Rules and Section 10 (7) of the P.F.A. Act which would not help the petitioner-accused. The Bombay High Court was dealing with order of acquittal passed by the learned Judicial Magistrate First Class. The accused was acquitted from the offence punishable under Section 7 (1) (2) read with Section 16 of the P.F.A. Act and the counsel appearing for the appellant has conceded before the Court that nowhere in the evidence of P.W.No.1 he has explained the reason for non-examination of the panchas or he should have given explanation or reason for non-examination of Panchas and there was no evidence to show that the sample was taken in a clean, dry bottle or jar or any other suitable container to the satisfaction of the Court.

18. One more decision cited by Mr.Naik is in case of the **State of Gujarat Vs. Gandabhai Arjanbhai decided in Criminal Appeal No.1035 of 1977 decided on 11th May, 1979** wherein this Court has upheld the order

of acquittal dismissing the State Appeal because the Court was satisfied that the mandatory provisions of Section 10 (1) (A) was not complied with. The evidence led by prosecution was suggestive of one fact that when Panch was called and signed on the slip affixed on the sealed bottle, meaning thereby, the sample was already taken and it was neither taken or kept in the container in the presence of independent Panch Witness. In the present case, the sample was taken in presence of one independent Panch Witness- Kanaiyalal Ramanlal Shah. On arrival of this Panch Witness at the shop of petitioner-accused, the complainant introduced himself as Food Inspector and in the presence of this Panch Witness, the intention of taking sample was shown to the vendor-accused and sample of black pepper was taken. The complainant has proved the signature made by the petitioner-accused on the lable and also proved that the signature of Panch Witness was obtained by him after sealing the sample. In such a situation, if the Court is able to listen the ring of truth on the say of complainant, the version of the complainant-Food Inspector can be accepted on careful consideration of other evidence i.e. the report of Public Analyst (Exh.17).

19. The Public Analyst in the present case has confirmed that the sample was received duly sealed and the seal was found intact. The reference in this regard made in the report of public analyst Exh.17 which provide sufficient corroboration to the evidence of the complainant. So, none of these judgments dealing with the acquittal appeal would help the petitioner-accused.

20. The judgment cited by Mr.Naik in case of **State Inspector of Police, Vishakhapatnam Vs. Surya Sankaram Karri, reported in (2006) 7 SCC 172**, where the Apex Court has observed that it is now well settled that when a document being in possession of a public functionary, who is under statutory obligation to produce the same before the Court of law, fails and / or neglects to produce the same, an adverse inference may be drawn against him. The learned Special Judge in aforementioned situation was enjoyed with a duty to draw an adverse inference. He did not consider the question from the point of view of statutory requirements, but took into consideration factors, which were not germane. But, this

observation would not help the accused in view of the nature of evidence led by prosecution in the present case. There is no element of hearsay evidence in the present case and therefore it is not possible for this Court to say that accused deserves benefit of doubt.

21. For short this Court does not find any merit in the application. On the contrary, it was possible for this Court to say that the Court is in agreement with two concurrent findings recorded in exercise of revisional jurisdiction vested with the Court and therefore no interference is required to be called for. It is to be observed that both the concurrent findings appears to have been arrived at on correct appreciation of evidence and no material or patent illegality nor any jurisdictional error is found. The above discussion is made only with a view to deal with the submissions made by Mr.Naik in reference to the provisions of Section 13 (2) of the Act.

22. In the result, the present Revision Application is hereby dismissed. Since the date of admission of the present Revision Application, the petitioner-accused is on bail, the petitioner-accused

should be given some reasonable time to surrender, because he would have to make certain arrangement for his family members, etc. The petitioner-accused is given eight weeks time to surrender before the trial Court from today. The petitioner-accused is, therefore, directed to surrender himself before the concerned trial Court on or before 20th December, 2007 to serve out the sentence, failing which the trial Court shall issue non-bailable Warrant to secure the presence of petitioner-accused so that he can be sent to Jail to serve the sentence. Bail Bond of the accused- original petitioner shall stand discharged / cancelled. Order and Direction accordingly.

(C.K.BUCH, J.)

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